INDEX

PAGE

PETITION FOR WRIT OF CERTIORARI 1-6

I. Summary and Statement of Matter Involved 2-3

II. Basis for Jurisdiction 3

III. Question Presented 3-4

IV. Reasons for Allowing the Writ 4-6

Prayer 6

SUPPORTING BRIEF 7-23

I. Opinion of Court Below 7

II. Grounds on which Jurisdiction is Invoked 8

III. Statement of the Case 8-12

IV. Specification of Errors 12

V. Argument 13-23

Summary 13

Point 1. The local law, as established by the South Dakota Supreme Court, is that Respondents could recover only if the evidence was consistent with Respondents' theory, and excluded every other rational theory, and if Respondents' theory was established to a reasonable certainty 13-14

Point 2. The Court of Appeals failed to follow such local law in that: (A) the decision is to the effect Respondents could recover if an inference in favor of Respondents' theory was "within reason," as distinguished from established with reasonable certainty; and (B) in that the Court of Appeals erroneously relieved Respondents of the requirement that the evidence must exclude every rational theory other than that asserted by Respondents 15-18

Point 3. Under the local law, properly construed and applied, the evidence did not sustain a jury finding in favor of Respondents 18-22

Conclusion 22-23

Appendix 24

PAGE

TABLE OF CASES CITED

Erickson v. Todd, 62 S. D. 280, 252 N. W. 879.....3, 4, 14

Erie R. R. Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188...6, 14

General Tire and Rubber Co. v. Hamm, 69 S. D. 72, 77, 6 N. W. (2d) 442, 444 14

Hardware Mut. Ins. Co. of Minnesota v. Jacob Hieb, Inc., 146 F. (2d) 447, 452, 453 .....6, 14

LeZotte v. Lindquist, 51 S. D. 97, 212 N. W. 503.....3, 4, 14, 21

Meier and Lockwood Corp. v. Dakota Livestock & Investment Co., 46 S. D. 397, 193 N. W. 138.....3, 4, 13, 21

Neal v. Chicago, R. I. & P. R. Co., 129 Iowa 5, 105 N. W. 197..... 17

Smith v. Gilbert Yards, 70 S. D. 246, 249, 16 N. W. (2d) 912, 913..... 14

TEXTS CITED

20 Am. Jur., Section 1189, Page 1043..... 15

23 C. J., Section 1792, Page 49..... 15

STATUTES CITED

United States Code, Sections 1254(1) and 2101(c).....3, 8

COURT RULES CITED

Revised Rules of the Supreme Court of the United States, Rule 38.....3, 8

IN THE

Supreme Court of the United States

OCTOBER TERM 1949

No._____

NATIONAL LEAD COMPANY, A CORPORATION,

Petitioner,

VS.

MAX SCHUFT AND WILLIAM G. SCHUFT (PLAINTIFFS) AND MILLERS NATIONAL INSURANCE COMPANY, MICHIGAN MILLERS MUTUAL FIRE INSURANCE COMPANY, MILLER'S MUTUAL FIRE INSURANCE ASSOCIATION OF ILLINOIS, MILL OWNERS MUTUAL FIRE INSURANCE COMPANY, GRAIN DEALERS NATIONAL MUTUAL FIRE INSURANCE COMPANY, PENNSYLVANIA MILLERS MUTUAL FIRE INSURANCE COMPANY, MILLERS MUTUAL FIRE INSURANCE COMPANY, WESTERN MUTUAL FIRE INSURANCE COMPANY, THE MILLERS MUTUAL FIRE INSURANCE COMPANY OF TEXAS, NATIONAL RETAILERS MUTUAL INSURANCE COMPANY, IMPLEMENT DEALERS MUTUAL FIRE INSURANCE COMPANY, IOWA HARDWARE MUTUAL INSURANCE COMPANY AND THE OHIO HARDWARE MUTUAL INSURANCE COMPANY, CORPORATIONS (ADDED PLAINTIFFS),

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, EIGHTH CIRCUIT

To the Honorable THE SUPREME COURT OF THE UNITED STATES:

The petition of National Lead Company, a Corporation, respectfully shows:

I.

SUMMARY AND STATEMENT OF MATTER INVOLVED

Petitioner seeks review of a judgment by the United States Court of Appeals of the Eighth Circuit rendered August 12, 1949 affirming a judgment by the District Court of the United States for the District of South Dakota entered October 5, 1948, and which was for recovery by Respondents (then Plaintiffs) of $41,800.00 plus $316.88 costs from Petitioner (then Defendant).

The action was for a money judgment, with jurisdiction grounded on diversity of citizenship. Respondents sought damages for destruction by fire of a building and contents at Belle Fourche, South Dakota, April 13, 1947. The fire originated in an adjoining structure wherein Petitioner conducted a plant for processing of bentonite (a clay found in the locality) and in which plant, for several days prior to the fire, there had also been conducted processing of lignitic humus, which is lignite coal found close to the earth's surface and thereby oxidized. The fire spread from Petitioner's plant to the adjoining building, of which the Respondents named above as Plaintiffs were the owners, and as to which the remaining Respondents, named above as added Plaintiff's were carriers of fire insurance, and by virtue of loss payments had been partially subrogated to rights of the owners against Petitioner.

Respondents' claim against Petitioner was predicated on alleged negligence of Petitioner as to the origin and escape of the fire.

There was no direct evidence to support such claim of negligence. When the fire was first discovered, it had made sufficient progress so smoke prevented ingress into the upper part of the structure. Evidence as to origin of the fire, and as to the alleged negligence, was entirely circumstantial.

From the adverse judgment of such District Court, Petitioner appealed to the United States Court of Appeals of the Eighth Circuit, contending the evidence was insufficient as a matter of law to sustain Respondents' claim. It was Petitioner's position that under the applicable local law, established by the South Dakota Supreme Court, damages could not be awarded on the basis of circumstantial evidence, unless the circumstantial evidence was not only consistent with the asserted claim, but inconsistent with any other rational theory, and with the proof such as to "produce conviction to a reasonable certainty on an unprejudiced mind." Petitioner asserted the proof did not meet the stated requirement.

The Court of Appeals affirmed the District Court judgment. As later more fully developed, Petitioner believes the controlling principles announced by the Court of Appeals at variance with the local law as declared by the South Dakota Supreme Court.

In the appended brief, the evidence is sufficiently summarized to show the relevant fact situation.

II.

BASIS FOR JURISDICTION

Sections 1254 (1) and 2101 (c), United States Code, and Rule 38, revised Rules of the Supreme Court of the United States, are the jurisdictional basis for review in this Court.

Under "Reasons for Allowing the Writ" is set forth Petitioner's contention that the Court of Appeals decision has decided an important question of local law in a way probably in conflict with the applicable local decisions.

III.

QUESTION PRESENTED

The case presents the following:

1. Whether the Court of Appeals misconstrued and failed to follow the applicable local law as to recovery of damages in a civil suit based entirely on circumstantial evidence, such local law being established by *Meier and Lockwood Corp. v. Dakota Livestock & Investment Co.*, 46 S. D. 397, 193 N. W. 138, *LeZotte v. Lindquist*, 51 S. D. 97, 212 N. W. 503 and *Erickson v. Todd*, 62 S. D. 280, 252 N. W. 879, and being to

the effect that in such case the action could be maintained only if the circumstances shown were consistent with the asserted claim, and inconsistent with any other rational theory, and with the proof such as to produce conviction to a reasonable certainty.

IV.

REASONS FOR ALLOWING THE WRIT

As already indicated, it is Petitioner's position that the Court of Appeals has decided an important question of local law in a way probably in conflict with the applicable local decisions.

Meier and Lockwood Corp. v. Dakota Livestock & Investment Co., 46 S. D. 397, 193 N. W. 138, *LeZotte v. Lindquist*, 51 S. D. 97, 212 N. W. 503, and *Erickson v. Todd*, 62 S. D. 280, 252 N. W. 879, already cited, are the decisions upon which Petitioner relies.

The Court of Appeals decision purportedly recognizes the doctrine of the South Dakota cases, but follows it only in form, as distinguished from following it in substance. The Court of Appeals decision in fact emasculates the local rule to an extent whereby it is meaningless, and undistinguishable from the less stringent rule of various other jurisdictions.

This is apparent from the following, with Arabic numerals in parentheses denoting references to the Court of Appeals opinion, as contained in the record certified to this Court:

> First, as appears from the latter part of the Court of Appeals opinion (176-177), the Court interprets the applicable local law to the effect that where under the evidence "such an occurrence is within reason, then it was for the jury to say whether the fire was so caused or not." This was grounded on what was quoted in the *Meier* case from a Wisconsin decision. A complete misconception of the *Meier* case is manifest. The court quoted from the Wisconsin decision simply on the point that origin of a fire could be shown by circumstantial evidence. As to the degree of proof required in such a case, the South Dakota Supreme Court explicitly said:
>
> > "It seems to be the rule that, under circumstances where the origin of a fire must be determined by circumstantial evidence, such circumstances must

be shown as will produce conviction to a reasonable certainty on an unprejudiced mind, and that each fact, from start to finish, shall by reasonable inference connect with the next fact in the line. . . ."

This squares with the *Erickson* and *LeZotte* cases. In the *Erickson* case the court held that the rule in a civil case as to the weight of circumstantial evidence is the same as in a criminal case, and that "the facts and circumstances shown must not only be consistent with such theory, but inconsistent with any other rational theory." The end result of the Court of Appeals decision in the present case is that the circumstantial evidence is sufficient if an inference could reasonably be drawn to support the asserted theory. This ignores the requirement that the evidence must exclude every other rational theory, and establish the claim to a reasonable certainty.

Second, from the last two paragraphs of its opinion, it is clear the Court of Appeals further misconstrued the established local law. The court held in effect that the rule as to exclusion of "any other rational theory" has application only where some other theory is established by the evidence. Whatever may be the case in jurisdictions where the rule as to circumstantial proof in civil cases is less strict, in South Dakota the applicable requirement is that the party asserting the claim can do so only by excluding every other rational theory. There is no burden on the adverse party to establish such other rational theory. This is shown by the *LeZotte* case where the South Dakota Supreme Court held the circumstantial evidence insufficient to supoprt an asserted claim as to origin of a fire, and this on the ground the evidence did not exclude hypotheses that the fire had been set intentionally or that there had been an explosion.

The basic question before the Court of Appeals was whether Respondents had established their case to the extent required by local law. Petitioner contended the case did not present a jury question unless it could reasonably be said that every rational theory, other than that asserted, was excluded, and

with Respondents' contention established to a reasonable certainty. Contrary to the *LeZotte* case the Court of Appeals held a jury case was made if the jury could reasonably infer the fire originated as contended, and placed the burden on Petitioner to establish some other rational theory, rather than on Respondents to negative any other rational theory.

The question is one of substantive law rather than merely procedural. It was so treated by the Court of Appeals of the Eighth Circuit in *Hardware Mutual Insurance Co. of Minnesota v. Jacob Hieb, Inc.*, 146 F. (2d) 447. If the present Court of Appeals decision stands, where a claim dependent on circumstantial evidence originates in South Dakota, a litigant unable to make a case in the state courts may prevail if in a situation such that he can resort to the federal courts. This is precisely the anomaly which *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 was designed to prevent.

Civil cases dependent on circumstantial evidence are frequent. To the end that where such cases originate in South Dakota the controlling principles should be the same in the federal courts as in the state courts, the sought review is urged.

PRAYER

WHEREFORE, your Petitioner respectfully prays that an order be entered granting this application for a writ of certiorari to review the decision of the United States Court of Appeals of the Eighth Circuit in the case numbered and entered on its docket as No. 13,883, National Lead Company, a Corporation, Appellant, vs. Max Schuft, et al., Appellees, and that the judgment be reversed and that your Petitioner have such other and further relief as to this Honorable Court may seem meet and just.

GEORGE J. DANFORTH,
HOLTON DAVENPORT,
Sioux Falls, South Dakota,

R. E. DRISCOLL, JR.
Rapid City, South Dakota,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM 1949

No._____

NATIONAL LEAD COMPANY, A CORPORATION,
Petitioner,

vs.

MAX SCHUFT AND WILLIAM G. SCHUFT (PLAINTIFFS) AND MILLERS NATIONAL INSURANCE COMPANY, MICHIGAN MILLERS MUTUAL FIRE INSURANCE COMPANY, MILLER'S MUTUAL FIRE INSURANCE ASSOCIATION OF ILLINOIS, MILL OWNERS MUTUAL FIRE INSURANCE COMPANY, GRAIN DEALERS NATIONAL MUTUAL FIRE INSURANCE COMPANY, PENNSYLVANIA MILLERS MUTUAL FIRE INSURANCE COMPANY, MILLERS MUTUAL FIRE INSURANCE COMPANY, WESTERN MUTUAL FIRE INSURANCE COMPANY, THE MILLERS MUTUAL FIRE INSURANCE COMPANY OF TEXAS, NATIONAL RETAILERS MUTUAL INSURANCE COMPANY, IMPLEMENT DEALERS MUTUAL FIRE INSURANCE COMPANY, IOWA HARDWARE MUTUAL INSURANCE COMPANY AND THE OHIO HARDWARE MUTUAL INSURANCE COMPANY, CORPORATIONS (ADDED PLAINTIFFS),
Respondents.

BRIEF IN SUPPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

OPINION OF COURT BELOW

The opinion herein of the United States Court of Appeals, Eighth Circuit (still unpublished) appears at Pages 171-177 of the record certified to this Court. The full citation is National Lead Company, a corporation, Appellant, vs. Max Schuft, et al., Appellees. The decision was rendered August 2, 1949.

II.

GROUNDS ON WHICH JURISDICTION IS INVOKED

Jurisdiction of this Court is invoked under Section 1254 (1) and 2101 (c), United States Code, and Rule 38 of Revised Rules of the Supreme Court of the United States. Petitioner contends review should be granted under paragraph 5 (b) of such Rule 38 in that the Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decisions.

III.

STATEMENT OF THE CASE

For references to the record, an Arabic numeral in parentheses will denote pages of the printed record certified to this court.

The suit was instituted in the United States District Court for the District of South Dakota for damages asserted to have been caused by alleged negligence of Petitioner in connection with the origin and escape of a fire which occurred April 13, 1947 in a bentonite processing plant operated by Petitioner at Belle Fourche, South Dakota. The fire spread to an adjoining structure owned by the Respondents named as Plaintiffs, and as to which the remaining Respondents were fire insurance carriers. Trial resulted in a jury verdict for Respondents for Forty-one Thousand Eight Hundred Dollars ($41,800.00), and on October 5, 1948 the District Court entered judgment for that amount and costs in favor of Respondents.

By appeal Petitioner took the case to the United States Court of Appeals of the Eighth Circuit contending that the evidence was insufficient to support the verdict, and that the Trial Court should have directed a verdict for Petitioner. By its Judgment entered August 12, 1949 the Court of Appeals rejected this contention and affirmed the District Court Judgment.

Petitioner here contends that the Court of Appeals misconstrued and did not follow the local law as established by the South Dakota Supreme Court. The fact situa-

tion will be reviewed sufficiently to show the relation thereto of the contentions herein advanced.

Petitioner's plant was a wooden building with a gable roof, the peak of which was fifty-one feet above the ground level (55, 139). There were three floor levels, with the two upper levels partly filled with catwalks and other objects but not completely (5, 7, 141-143, 145). The plant was chiefly used for grinding of bentonite, a type of clay used after processing for industrial purposes, including well drilling operations (8).

Commencing four or five days before the fire, some so-called lignitic humus was ground (13, 20, 22). Bentonite was ground on a twenty-four hour a day schedule, and the humus operation only a few hours a day (20).

Such humus is the end product of atmospheric oxidization of ordinary lignite so close to the ground surface it is exposed to air and weather conditions (87, 88, 89, 100, 101). As indicated by the opinion, there was evidence that during the humus grinding operations extensive clouds of black dust from the humus permeated the plant and settled on the walls, ceilings, floors, etc. (172, 173).

There was some conflict as to the inflammability and explosive qualities of the humus dust. There was agreement, however, that it was not any more inflammable than wood (44, 105, 109, 110). There was also agreement that it was not inflammable or explosive unless heated to 1100 degrees Fahrenheit (33, 93, 103, 104). Petitioner's two expert witnesses and one of Respondents' expert witnesses agreed there could be no propagation of flame in such a dust cloud unless there was a concentration of at least one-fifth of an ounce to a cubic foot, which would make a cloud so dense persons close together would have an indistinct view of each other (33, 34, 93, 104). Respondents' remaining expert thought he could get propagation on a lesser concentration than one-fifth of an ounce to a cubic foot (122). There was also agreement that bentonite dust was not inflammable and that mixture of bentonite dust with humus dust would cut down inflammability (109, 121).

As shown by the accompanying Petition for the Writ, the critical question is whether the Court of Appeals correctly construed and followed the local law of South Dakota as to

proof required to support a claim based solely on circumstantial evidence. Accordingly, it is important to show the fact situation so far as it reflects anything which would sustain a finding that Petitioner's negligence, if any, in the humus operations, was the proximate cause of the fire.

As stated in the Court of Appeals decision it was Respondents' theory that: "The fire box openings in the furnaces and the exposed gas flames of the conveyors created a dangerous condition in relation to the inflammable humus dust, amounting to negligence on the part of National Lead, and that this negligence had been the cause of the fire."

The furnaces were on the ground floor, and only two were in actual operation the morning of the fire (6, 68, 141). Three of the gas flames were lighted the morning of the fire, these being on the ground floor (68, 141). None of the expert witnesses supported Respondents' theory as to the causative agency of the fire. Both of Petitioner's experts stated opinions that the humus operations were not responsible (94, 113). One of Respondents' experts was not asked for an opinion as to this (29, 37). The other of Respondents' experts said he could form no opinion as to the cause of the fire, but that he believed the humus dust accelerated spread of the fire (120, 121), and that without the humus dust the chance of putting out the fire would have been "a lot better," but that he did not know whether, absent the humus, the fire could have been extinguished (124).

The testimony was in agreement to the effect that the humus processing was suspended at four or five o'clock the afternoon preceding the fire and that the bentonite processing continued, with the resulting dust from the bentonite (60, 66, 71, 72, 78). There was also agreement that the fire commenced about nine o'clock the following morning (12, 23, 56, 57, 62, 63, 68, 69, 76, 79).

With one exception the witnesses were in agreement that on the morning of the fire the humus dust had settled, and that there was no such dust in the air (20, 21, 57, 62, 69, 78). The one exception was Respondents' witness, Wesley Flack.

The Court of Appeals decision summarizes Mr. Flack's testimony in this respect to the effect that:

"When he came to work that morning the air still contained black dust, which he thought might have been due to the stirring up caused by the operation of the machinery. It was sufficiently heavy so that the janitor was unable to rid the floors of it in his morning cleaning. 'Sweep one room and come back and the next one would be just as bad as it was before he started.'"

This is incomplete in that it overlooks part of Mr. Flack's testimony whereby the foregoing was modified and qualified. Such additional testimony follows:

"They weren't grinding humus that morning. They hadn't been since four or five o'clock the afternoon before. I think it was five. It was about eight in the morning we came to work, fifteen hours from the time they had been grinding humus. Q. You certainly don't claim, Mr. Flack, there was any of that dark dust left in the air from the operation fifteen hours before? A. I could see it in the air. Q. You say there was a fellow sweeping. Is that it? A. Yes. Q. You claim there was some of that dust in the air from the fellow sweeping. Is that it? A. *I don't know if he was sweeping that morning.* Q. What you mean, of course, *is simply a small amount of it that you then saw.* Is that right? A. Yes, it was. Not as much as when they was grinding. It was still in the air." (27-28.) (Emphasis supplied.)

Mr. Flack was apparently the first person to notice the fire. At that time he was on the roof "clear at the top," smoking a cigarette (28). He smelled smoke, looked in, and saw smoke and some flame (28). Further:

". . . It seemed to be at the top part of the building when I seen it. All I could see was just smoke and fire through the window. As far as I could see *it was all at that top story.* It was not over in that part of the building where that window was that I came out. The blaze *seemed to break out*—I could see it from the outside. It seemed to come up and through the center of the roof. . . ." (28.) (Emphasis supplied.)

The quoted testimony was not disputed. Other persons in the building at the time were in lower portions thereof, and

testified in substance that when they saw the fire it was working downward, several of them placing its then position in the vicinity of the level of the third floor and one of them placing it at about the level of the second floor (56, 59, 62, 63, 64, 69, 75, 76, 77). There was undisputed evidence that railroad tracks adjoined the building immediately on the north, that a switch engine was operating there at the time of and immediately prior to the time of the fire (57, 64, 76) and that both gas and oil were used in the operation of the plant (6, 7, 68).

At the conclusion of the evidence the Trial Court overruled Petitioner's motion for a directed verdict, made on the ground the evidence was insufficient to sustain a verdict for Respondents (124, 125). Thereafter the Trial Court also overruled Petitioner's motion for judgment n. o. v. (153).

IV.

SPECIFICATION OF ERRORS

1. The United States Court of Appeals of the Eighth Circuit erred herein in holding in effect that the local law of South Dakota permitted a jury finding in favor of Respondents if an inference in favor of Respondents' contention was within reason, as distinguished from being established with reasonable certainty, and further erred in failing to recognize that such local law required Respondents to negative every rational theory as to the origin of the fire, other than that assertd by Respondents.

2. Such Court of Appeals further erred in holding Petitioner was not entitled to a jury verdict directed by the Trial Court.

V.

ARGUMENT SUMMARY

Point 1. The local law, as established by the South Dakota Supreme Court, is that Respondents could recover only if the evidence was consistent with Respondents' theory, and excluded every other rational theory, and if Respondents' theory was established to a reasonable certainty.

Point 2. The Court of Appeals failed to follow such local law in that: (a) the decision is to the effect Respondents could recover if an inference in favor of Respondents' theory was "within reason," as distinguished from established with reasonable certainty; and (b) in that the Court of Appeals erroneously relieved Respondents of the requirement that the evidence must exclude every rational theory other than that asserted by Respondents.

Point 3. Under the local law, properly construed and applied, the evidence did not sustain a jury finding in favor of Respondents.

Point 1.

THE LOCAL LAW, AS ESTABLISHED BY THE SOUTH DAKOTA SUPREME COURT, IS THAT RESPONDENTS COULD RECOVER ONLY IF THE EVIDENCE WAS CONSISTENT WITH RESPONDENTS' THEORY, AND EXCLUDED EVERY OTHER RATIONAL THEORY, AND IF RESPONDENTS' THEORY WAS ESTABLISHED TO A REASONABLE CERTAINTY.

There can be no substantial question as to this.

In *Meier and Lockwood Corp. v. Dakota Livestock & Investment Co.*, 46 S. D. 397, 193 N. W. 138, decided April 3, 1923, the South Dakota Supreme Court dealt with a fire alleged to have been started by sparks from a cook stove operated in connection with a hay camp. At page 406 of the South Dakota report and at page 142 of the North Western report, the Court said:

> "It seems to be the rule that, under circumstances where the origin of a fire must be determined by circumstantial evidence, such circumstances must be shown as will produce conviction to a reasonable certainty on an unprejudiced mind, and that each fact, from start to finish, shall by reasonable inference connect with the next fact in the line."

In *LeZotte v. Lindquist,* 51 S. D. 97, 212 N. W. 503, decided March 7, 1947, the Plaintiff's claim was that a fire originated from negligence in operating a defective stove. As shown by pages 101-2 of the South Dakota report and page 505 of the North Western report, the Court held the Plaintiff had failed to establish a case in that the evidence did not exclude all reasonable hypotheses other than that asserted by the Plaintiff as to the cause of the fire.

Erickson v. Todd, 62 S. D. 280, 252 N. W. 879, decided February 15, 1934, is not a fire case, but dealt with the requirement applicable when it is sought by circumstantial evidence to establish a fact contention in a civil action. As appears at page 284 of the South Dakota report and at page 881 of the North Western report, the Court said:

> "This court has consistently applied the rule in criminal cases that, in order that a theory be established by circumstantial evidence, the facts and circumstances shown must not only be consistent with such theory, but inconsistent with any other rational theory. (Citing cases.) This rule, we are convinced, should be the rule whereby the weight of circumstantial evidence is determined in a civil case as well as in a criminal case."

The foregoing rule, as stated in the *Erickson* case, was approved in *General Tire and Rubber Co. v. Hamm*, 69 S. D. 72, 77, 6 N. W. (2d) 442, 444, decided November 28, 1942.

The *LeZotte* case was cited with approval in *Smith v. Gilbert Yards*, 70 S. D. 246, 249, 16 N. W. (2d) 912, 913, decided December 21, 1944.

In *Hardware Mut. Ins. Co. of Minnesota v. Jacob Hieb, Inc.*, 146 F. (2d) 447, 452, 453, decided January 8, 1945, the United States Court of Appeals of the Eighth Circuit held that the foregoing quotation from the *Erickson* case stated the local law of South Dakota, and was binding on the Federal Courts under *Erie R. R. Co. v. Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188.

Point 2.

THE COURT OF APPEALS FAILED TO FOLLOW SUCH LOCAL LAW IN THAT: (A) THE DECISION IS TO THE EFFECT RESPONDENTS COULD RECOVER IF AN INFERENCE IN FAVOR OF RESPONDENTS' THEORY WAS "WITHIN REASON," AS DISTINGUISHED FROM ESTABLISHED WITH REASONABLE CERTAINTY; AND (B) IN THAT THE COURT OF APPEALS ERRONEOUSLY RELIEVED RESPONDENTS OF THE REQUIREMENT THAT THE EVIDENCE MUST EXCLUDE EVERY RATIONAL THEORY OTHER THAN THAT ASSERTED BY RESPONDENTS.

From the opinion below it is manifest that the Court of Appeals fell into the basic error of recognizing existence of the law established by the South Dakota decisions, but nevertheless construing and treating such local law exactly the same as if the less stringent rule were to be followed.

Beyond doubt, the rule in many—perhaps most—jurisdictions is less stringent.

The more liberal rule is that stated in 20 Am. Jur. at Page 1043, in Section 1189 as follows:

> ". . . In civil cases the rule of criminal law that where circumstantial evidence is submitted the facts proved must be such as to preclude every other hypotheses except the guilt of the accused does not apply. In a civil case circumstantial evidence need not exclude every reasonable conclusion other than that arrived at by the jury. The rule as to circumstantial evidence in a civil case is that a party will prevail if the preponderance of the evidence is in his favor. Where two equally plausible conclusions are deducible from the circumstances, the jury is left to decide which shall be adopted."

In 23 C. J., at Page 49, in Section 1792, the more liberal rule is stated as follows:

> ". . . but there is also authority for the view that it is sufficient for the party having the burden of proof to make out the more probable hypothesis, and that the evidence need not rise to that degree of certainty which will exclude every other reasonable conclusion . . ."

If the present case had arisen in a jurisdiction following the liberal rule, the problem would be different. The distinction is vital. As shown by the above text quotations, under the more liberal rule it is simply a question of whether under the circumstances shown the jury may reasonably draw the asserted inference. On the other hand, and as shown by the South Dakota cases, and the authorities therein cited, where the strict rule prevails, a case is established only if the evidence can fairly be said to permit only one reasonable conclusion, with all other rational theories excluded.

That the court below mistakenly applied the more liberal rule is evident (176, 177). The court concludes that Respondents' theory was a reasonable inference as distinguished from "mere speculation and conjecture." Then, and from the paragraph of the opinion commencing at the bottom of Page 176, it is apparent that the court misconstrued the *Meier* case as authority that if "such an occurence is within reason, then it is for the jury to say whether the fire was so caused or not." Such misconstruction of the *Meier* case stemmed from the fact that this language was quoted from a Wisconsin decision. This, however, was simply on the point that origin of a fire could be proved by circumstantial evidence, and did not deal with the quantum of proof required to make a case. In a succeeding paragraph the South Dakota court directly stated that the circumstances must be such as to "produce conviction to a reasonable certainty on an unprejudiced mind."

If there were room for any doubt as to the effect of the *Meier* decision, it is removed by the later South Dakota Supreme Court decisions in the *LeZotte* and *Erickson* cases, the latter explicitly stating the rule that the "facts and circumstances shown must not only be consistent with such theory, but inconsistent with any other rational theory," with the controlling principle the same in a civil as in a criminal case.

This is almost the antithesis of the liberal rule that it is enough if the inference is "within reason." Nowhere does the lower court pass on the question whether it could fairly be said that Respondents' theory was the *only* reasonable inference from the evidence, showing that the case was decided in the light of the liberal rule, and that the strict rule was not followed at all.

Corollary to the foregoing, and as shown by the last two paragraphs of the opinion, the Court of Appeals fell into the error of holding that "any other rational theory" was limited to such theories as are established by the evidence, rather than to any theory *open* under the evidence.

Such error was also fundamental. It would leave the strict rule meaningless and undistinguishable from the liberal rule.

The *LeZotte* case shows the South Dakota court had an entirely different conception of the strict rule than that stated by the lower court. In the *LeZotte* case the plaintiff contended the fire originated from an over-heated defective stove. The court said:

> "Assuming that it be true that the peculiar defects of this stove rendered it possible for it to be overheated; there is yet no proof that the stove either did become overheated—excepting the presumption which we have heretofore considered—or that, if the stove did become overheated, it caused the destruction of the building. Despite the defects in the stove, the fire may have been set intentionally. There may have been an explosion in the stove in no wise caused by any defects of the stove, which scattered fire in the room in which the stove was standing, or an explosion which, through the other opening in the chimney, scattered fire on the goods stored in the adjoining room . . . " 51 S. D. 101.

Other cases following the strict rule are to the same effect. For instance, in *Neal v. Chicago, R. I. & P. R. Co.*, 129 Iowa 5, 105 N. W. 197, cited by the South Dakota court in the *Erickson* case, it was held that plaintiff's circumstantial evidence as to proximate cause had failed because another theory, than that asserted, was not excluded, and the court added:

> ". . . This is, of course, a mere surmise, but we are justified in any surmise which is as consistent with the facts proven as the theory which is sought to be established by such facts for the purpose of determining whether the proven facts tend to support plaintiff's theory . . ."

Under the applicable local law, Respondents could prevail only if Respondents' theory was established with "reasonable certainty," exactly as if the issue arose in a criminal case, and with every other rational theory excluded.

In the present case, it is apparent the Court of Appeals did not follow and apply the established local law.

Point 3.

UNDER THE LOCAL LAW, PROPERLY CONSTRUED AND APPLIED, THE EVIDENCE DID NOT SUSTAIN A JURY FINDING IN FAVOR OF RESPONDENTS.

The ultimate question is whether it could be reasonably concluded that Respondents proved their case to a "reasonable certainty," establishing that their theory is consistent with the circumstances shown, and that every other rational theory has been excluded, this after resolving all evidentiary conflicts in favor of Respondents, and giving Respondents the benefit of all inferences that may reasonably be drawn in their favor from the evidence.

The Court of Appeals felt the jury might reasonably have found the following basic facts:

> First, and on the basis of Wesley Flack's testimony, that there was a substantial amount of humus dust in the air the morning of the fire.
>
> Second, that although there was no dispute that the humus dust could not ignite or explode unless heated to 1100 degrees Fahrenheit, with a concentration reaching, or at least approaching, one-fifth of an ounce to a cubic foot, there was testimony this "could" be affected by other variables in the air.

Third, that although eyewitnesses who saw the fire in its early stages placed it at various points from the roof to the second floor, and travelling downward, it could be that gases were originally ignited by the furnaces or gas flames on the ground floor, and when heated, traveled upward.

Fourth, that the rapid spread of the fire and the series of puffs of smoke and fire indicated "some form of gaseous propagation."

Fifth, that all the evidence indicated the fire started inside the plant, and that this negatived any theory the origin was from the switch engine.

The statement of the foregoing in itself shows the proof did not measure up to the requirement of the local law. Assuming all of the stated elements justified, the most that can be said is that the evidence supported a belief that the fire could have been caused by ignition of the humus dust. It could not be said that this is established with "reasonable certainty"—that every other rational theory is excluded.

Moreover, and in essential particulars, the evidence does not justify several of these five elements.

Mr. Flack's testimony does not support a conclusion that there was any dust concentration such as that essential for ignition or explosion. It is true that at one point he testified as quoted at Page 4 of the opinion, and that this could have been construed as having reference to conditions on the morning of the fire. However, he later qualified and modified this as follows:

". . . It was about eight in the morning we came to work, fifteen hours from the time they had been grinding humus. Q. You certainly don't claim, Mr. Flack, there was any of that dark dust left in the air from the operation fifteen hours before? A. I could see it in the air. Q. You say there was a fellow sweeping. Is that it? A. Yes. Q. You claim there was some of that dust in the air from the fellow sweeping. Is that it? A. *I don't know if he was sweeping that morning.* Q. *What you mean, of course, is simply a small amount of it that you then saw. Is that right?* A. *Yes, it was. Not as much as when they was grinding. It was still in the air.*" (27-28.) (Emphasis supplied.)

The cited expert testimony was simply as to what "could" have been. There was no actual evidence that humus dust had in fact been dislodged.

There was no evidence that the "puffs" of smoke and rapid spread of the fire were peculiar to a fire from humus dust, as distinguished from wood. In fact, the evidence was to the contrary. All of the experts agreed that wood is at least as inflammable as humus or humus dust (44, 105, 109, 110). It is a well known physical fact that fire is the burning of gas emanating from the heated substance, whether the substance is humus or wood, and there is no evidentiary or other basis for an inference that the manifestations noted were peculiar to a humus fire rather than a wood fire.

As to variables in the air, the evidence is undisputed that the variable present in large quantities was bentonite dust, which would cut down, instead of increase, the inflammable or explosive qualities of the humus (109, 121).

The evidence was, in fact, consistent with a theory that the fire started on the roof. Mr. Flack testified that when he first saw the fire:

> ". . . It seemed to be at the top part of the building when I seen it. All I could see was just smoke and fire through the window. As far as I could see *it was all at that top story.* It was not over in that part of the building where that window was that I came out. The blaze *seemed to break out—I could see it from the outside. It seemed to come up and through the center of the roof.* I could see the flame in through the window. I saw the flame both places. I saw it near the center of the roof, and that was way at the top . . ." (28.) (Emphasis supplied.)

This is exactly what would have occurred if the fire had started from a spark on the roof. As soon as the fire had burned through the roof, it would "come up and through" the roof.

Mr. Flack's testimony in this respect was undisputed. There was no basis for rejection of it. He was Respondents' witness. All of the other testimony is reconcilable with what he said he saw. It is apparent that the witnesses who saw the fire at a lower level detected it later than Mr. Flack, and

said it was travelling a downward course. Accordingly, the evidence did not exclude, but on the contrary supported, a rational theory that the fire started on the roof. Neither did the evidence exclude numerous other rational theories, all of which were left open, such as escaping gas, ignition of fumes from the oil burners in the furnaces, and many others.

The point is illustrated and made clear by a comparison of the South Dakota Supreme Court decisions in *Meier and Lockwood Corp. v. Dakota Livestock & Investment Co.*, 46 S. D. 397, 193 N. W. 138 and in *LeZotte v. Lindquist*, 51 S. D. 97, 212 N. W. 503.

In the *Meier* case the plaintiff asserted the fire was caused by negligent operation of a cook stove at a hay camp. It was shown that the fuel used was soft coal, with no screen or other protection to prevent escape of sparks. On the basis of the following, the court held the case presented a jury question:

> "There was only one fire within a mile and a half of the cook car. There was a hot fire in the cookstove in the cook car at the time the fire started, about 100 feet away. There was no spark arrester or anything to prevent sparks escaping from the cookstove. The chimney to the cookstove was a straight pipe not over 6 feet high. The fire probably started within from 75 to 125 feet of the cook car. At the time the fire started or just before, the wind was in the right direction to carry cinders or sparks from the cookstove to the place where the fire started. No other cause than a spark from this cookstove is known which could have caused the fire. The stubble and hay were quite close to the cook car, and were very dry and in a highly inflammable condition. The high wind would naturally ignite sparks. It is probable that a fresh fire was started to get the dinner, because the day was hot and no other reason for building a fire than the getting of the noon meal is suggested." (See Page 406 of the South Dakota report, and Page 142 of the North Western report.)

On the other hand, and in the *LeZotte* case, the court dealt with circumstances insufficient to make a case under

the requirement of the local law. The plaintiff claimed the fire was caused by negligence in overheating a stove. It was shown there were V-shaped cracks in the fire pot, that the grate was held up on one side by a brick placed in the ash pan, and that there was no damper in the stove pipe which connected the stove with a brick chimney, plaintiff contending that the crack and the lack of a damper would permit the stove to become overheated. The court held this proof did not reach the required standard in that

> "Assuming that it be true that the peculiar defects of this stove rendered it possible for it to be overheated; there is yet no proof that the stove either did become overheated—excepting the presumption which we have heretofore considered—or that, if the stove did become overheated, it caused the destruction of the building. Despite the defects in the stove, the fire may have been set intentionally. There may have been an explosion in the stove in no wise caused by any defects of the stove, which scattered fire in the room in which the stove was standing, or an explosion which, through the other opening in the chimney, scattered fire on the goods stored in the adjoining room . . ."

The analogy of the *LeZotte* case to the present case is apparent. In each instance the most that could be said is that the cause *could* have been that asserted, and in each instance there was failure to exclude all other rational theories. The *LeZotte* case is definite that if another rational theory is left open under the evidence, the case fails. The Court of Appeals was mistaken in its view that it was incumbent upon Petitioner to establish the fire was caused by an agency other than that claimed by Respondents.

CONCLUSION

The question here presented has application to every case originating in South Dakota, resting on circumstantial evidence, and litigated in the federal courts.

Unless the rule followed in the federal courts is harmonized with the local law, vital substantive rights will depend on whether the federal or the state courts are the forum. This is the evil at which the *Tompkins* case struck.

For this compelling reason, it is urged that this Court should review the case.

Respectfully submitted,

GEORGE J. DANFORTH,
HOLTON DAVENPORT,
Sioux Falls, South Dakota,

R. E. DRISCOLL, JR.
Rapid City, South Dakota,
Counsel for Petitioner.

APPENDIX

Rules 10(a), 10(b) and 10(c), United States Court of Appeals, Eighth Circuit

Rule 10(a) *Entire Record Not to Be Printed.* Unless ordered by this court, the entire record on appeal, or on petition to review or to enforce an order of an administrative board, agency or commission, need not be printed. The appellant or petitioner shall serve and file with his brief a separate printed record, carefully indexed, which shall contain a clear, concise and condensed statement of so much of the entire record on appeal or review as may be essential to show jurisdiction and to enable the court to decide the questions presented for review.

Rule 10(b) *Contents of Printed Record.* The printed record shall contain all of the essential pleadings, essential docket entries, the judgment or order appealed from or sought to be reviewed or enforced, and the opinion, findings and conclusions of the trial court or administrative agency, and, if the case was tried to a jury, the complete instructions of the trial court and the verdict. The printed record shall also contain so much of the evidence, either in narrative or question and answer form, as may be necessary to enable this court to determine the questions presented for decision. If the printed record contains any matter in a foreign language, it must be accompanied by a correct translation thereof. If the appellant or petitioner in his brief challenges rulings upon evidence, such evidence, the objections interposed thereto, and the rulings questioned shall be quoted in the printed record, and if the question of the sufficiency of the evidence to support a finding, ruling, order, verdict or judgment of the court or board is raised by the appellant or petitioner, he shall include in the printed record all evidence received upon the trial or hearing pertinent to that question.

Rule 10(c) *Supplement to Printed Record by Appellee.* In case the appellee or respondent shall be of the opinion that the printed record submitted by the appellant or petitioner is inaccurate or omits essential portions of the entire

record, he may file and serve with his answering brief a separately printed supplement to the printed record, carefully indexed, containing such additional portions of the record as he deems essential for consideration by the court in deciding the case.

INDEX

PAGES

PETITIONER'S REPLY BRIEF (Corrections as to Statement of Facts). 1
REPLY TO RESPONDENTS' ARGUMENT..... 2

TABLE OF CASES CITED

Erickson v. Todd, 62 S. D. 280, 252 N. W. 879..... 3
Francis v. Humphrey, 25 Fed. Supp. 1..... 3
LeZotte v. Lindquist, 51 S. D. 97, 212 N. W. 503..... 3

IN THE

Supreme Court of the United States

OCTOBER TERM 1949

No. 386

NATIONAL LEAD COMPANY, A CORPORATION,

Petitioner,

vs.

MAX SCHUFT, et al.,

Respondents.

PETITIONER'S REPLY BRIEF

Respondents' "Statement of Facts" is misleading. As hereinafter used, an Arabic numeral will indicate pages of the record certified to this Court.

At Pages 2 and 3 of Respondents' brief appears statements as to large numbers of open flames in Petitioner's plant. It was undisputed that on the morning of the fire the only flames to which there was atmospheric access were in two furnaces on the ground floor and three gas flames under the driers, all of which were on the ground floor (68, 141).

There was no evidence to support the statement at Page 8 of Respondents' brief to the effect that there would be no flash or explosion from the ignited wood. On the contrary, it was undisputed that wood was at least as inflammable as the lignitic humus (44, 109-110).

The record does not support the statement at Page 4 of Respondents' brief that "on the morning of the fire the air was full of humus lignite dust." With one exception the witnesses all testified that on the morning of the fire there was no humus dust in the air (57, 62, 69, 78). Only one witness testified to seeing such dust in the air that morning, and he stated that there was a small amount (27-28). Also at Page 4 of Respondents' brief is a statement that at the start of the fire it "was not confined to any particular place but was all over." This was not the evidence. The witness who first saw the fire said: "It seemed to be at the top part of the building . . . As far as I could see it was all at that top story . . . It seemed to come up and through the center of the roof . . ." (28).

REPLY TO RESPONDENTS' ARGUMENT

Respondents in substance contend that all that Petitioner urges is a review of fact questions.

This is not correct.

As shown by our Petition and Brief, the vital question is whether the Court of Appeals correctly construed and applied the local law, established by South Dakota Supreme Court decisions, that where in a civil case a litigant relies on circumstantial evidence, he can prevail only if the circumstances shown are consistent with his contention, and inconsistent with any other rational theory, and with the asserted conclusion proved to a reasonable certainty.

The Court of Appeals professed to follow this rule, but clearly did not do it. After citing the rule, the Court of Appeals' decision proceeds in effect to emasculate it.

As Respondents seem to concede at Page 7 of their brief, the ultimate result of the Court of Appeals' decision is that the South Dakota rule is met if under the circumstances shown the asserted contention is "within reason." This is obviously something different than establishing such conclusion to a reasonable certainty, and excluding every other rational theory.

To say that it is enough if the conclusion is "within reason" only follows the South Dakota rule part way. It ignores the

vital feature of excluding every other rational theory. It, further, and under the direct holding of the Court of Appeals' decision, relieves the proponent of excluding every other rational theory, and places on the adverse party the burden of establishing some other rational theory.

As to whether this conclusion is one of substantive or adjective law, reference is made to the masterly opinion of Judge Wham of the District Court of the Eastern District of Illinois, in *Francis v. Humphrey*, 25 Fed. Supp. 1. The conclusion there reached, on unassailable logic, is that where the local law places on a plaintiff in a personal injury action the burden of proving freedom from contributory negligence, this is a rule of substantive, rather than of adjective, law. This is directly applicable here.

The gist of the question presented is whether the Court of Appeals has actually followed the local law when the inescapable effect of the decision is that a vital part of the local rule is eliminated. The decision cannot be reconciled with the late pronouncements of the South Dakota Supreme Court in *Erickson v. Todd*, 62 S. D. 280, 252 N. W. 879 and *LeZotte v. Lindquist*, 51 S. D. 97, 212 N. W. 503.

Respectfully submitted,

GEORGE J. DANFORTH,
HOLTON DAVENPORT,
Sioux Falls, South Dakota,

R. E. DRISCOLL, JR.
Rapid City, South Dakota,
Counsel for Petitioner.

FILE COPY

FILED
OCT 25 1949
CHARLES ELMORE CR
CL

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1949

No. 386

NATIONAL LEAD COMPANY, a Corporation,
Petitioner,

vs.

MAX SCHUFT and WILLIAM G. SCHUFT (plaintiffs), et al.,
Respondents.

RESPONDENTS' BRIEF OPPOSING GRANTING OF CERTIORARI

H. F. FELLOWS,
Rapid City, South Dakota,

PAT MORRISON,
JULIUS SKAUG,
Mobridge, South Dakota,

LEM OVERPECK,
Belle Fourche, South Dakota,
Attorneys for Respondents.

Gr. 2262 Hayward-Court Brief Printing Co., Minneapolis 15, Minn. Gr. 5170

INDEX

Page

I. Opinion in court below 1

II. Statement of facts 1

Argument Summary 5

Point 1—Local law as established by South Dakota Court strictly followed and applied 5

Point 2—Phrases "within reason" and "with reasonable certainty" are synonymous and South Dakota Court chose expression "within reason" used in Court of Appeals decision 7

Point 3—Evidence is ample under stringent South Dakota rule 7

Point 4—Certiorari should be denied because (a) petition fails to show a decision in conflict with South Dakota law and (b) the matter of sufficiency of evidence is for trial and appellate courts 9

TABLE OF CASES

Erickson v. Todd, 62 S. D. 280, 252 N. W. 879 5
Erie v. Tomkins, 304 U. S. 64, 58 S. Ct. 817 6
Finkelston v. Chicago, etc., Ry. Co., 94 Wis. 270, 68 N. W. 1005 6
Forsyth v. Hammond, 166 U. S. 506, 41 L. Ed. 1025 9
Hardware Mutual Ins. Co. v. Heib, 146 F. (2d) 447 5
Jackson County v. Duffy, 147 F. (2d) 227 5
King v. Yancy, 147 F. (2d) 379 6
Lane and Bowler Corp. v. Western Well Works, 261 U. S. 387, 67 L. Ed. 712 7
Mangum Import Co. v. Coty, 262 U. S. 159, 67 L. Ed. 922 8
Meier and Lockwood Corp. v. Dakota Livestock & Investment Co., 46 S. D. 397, 193 N. W. 138 ..... 5, 6
Minnehaha County v. Kelly, 150 F. (2d) 356 5
Risty v. Rock Island, etc., 270 U. S. 378, 46 S. Ct. 236 7
Southern Power Co. v. North Carolina Public Service Co., 263 U. S. 508, 68 L. Ed. 413 8
Turner County v. Miller, 170 F. (2d) 820 5
Wilkerson v. McCarty, 69 S. Ct. 413 ..... 9, 10

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1949

No. ———

NATIONAL LEAD COMPANY, a Corporation,
Petitioner,

vs.

MAX SCHUFT and WILLIAM G. SCHUFT (plaintiffs), et al.,
Respondents.

RESPONDENTS' BRIEF OPPOSING GRANTING OF CERTIORARI

I.

OPINION

The opinion of the Court of Appeals, Eighth Circuit, is still unpublished but a certified copy appears in the record (176).

II.

STATEMENT OF FACTS

Petitioner's statement of the case is incomplete and emphasizes defensive matter, properly for the jury but of no moment here. We therefore submit a brief statement of the proof which was the basis for the jury finding.

Numerals in parentheses, unless otherwise indicated, refer to the pages of the printed record.

Petitioner owned a large wooden building in which it processed bentonite, an inert clay found in the vicinity. It is taken from the ground in a wet, sticky condition (8). After being dried and ground bentonite is usable for various industrial purposes (8).

To facilitate drying the raw bentonite, it was cut or broken up into pieces suitable for grinding and fed to conveyor belts for movement to the dryers (8). Under the conveyor belts were numerous flames from gas jets maintained to keep the wet bentonite from sticking to the belts (7, 10, 15). At least two of the gas jet burners were generally in operation when bentonite was ground (15). These burners were made of pipes with holes forming the jets and the flames were produced by gas fed into the pipes (6-8). Such gas jets were also maintained under bins and chutes where the bentonite was transported and kept (6). The open conveyor fires were burning when bentonite was dried, whether it was winter or summer (11).

All these gas jet flames were open flames. They were all exposed to the air in the room (7, 14). There were hundreds, maybe a thousand, of such exposed flames (7, 10). There were such open flames on the second floor (6). The highest was about 10 feet below the level of the third floor (11). The highest of the furnaces was about six feet above the level of the second floor (15). For drying purposes the plant had four furnaces or combustion chambers which furnished the heat for the rotary driers. These furnaces were operated by oil flames which heated the air used to dry the bentonite (6). This air was heated to 1,800 to 2,000 degrees in the fire boxes (6, 13).

The furnaces were of fire brick with steel supports on the outside. On the sides there were large holes big

enough for a man to crawl through for the admission of excess air. One could put his hand in through this opening and there was no obstruction between the air of the room and the flame and heat inside the furnaces. That was true of all these furnaces (6, 13).

Without eliminating any open flames or making any change in the many sources of ignition, the defendant undertook a wholly new operation (81). It engaged in the grinding and packaging of weathered lignite coal sold under the trade name of humus. Defendant bought two carloads or about 80 tons of this substance from the American Aluminate Company of Bowman, N. D. (Exhibit C, 13).

The humus came from a lignite coal mine and consists of that portion of the coal nearest the surface (87). The weathering had some effect but the material was quite similar to the original lignite (87). Humus is a grade of coal (31). As to its inflammability it is very similar to lignite coal (30). The humus or lignite is more inflammable than Pocahontas and similar bituminous coal (30).

Humus lignite coal had been ground and sacked for several days (20) before the fire, causing great clouds of humus dust to become suspended in the air (22) settling on walls, ceilings, beams, catwalks, cobwebs, ladders and machinery (22-23). This grinding and dissemination of the dust continued up to 4:00 o'clock p. m. on the Saturday before the fire (16).

This dust was inflammable and had the properties of lignite coal dust (30). It would explode or burn upon coming in contact with fires or flames (30, 38). The analysis showed a high content of volatile matter (Exhibit B, 147). A dust cloud of this dust could ignite spontaneously without contact with a flame or spark (36). Upon ignition from a flame or from spontaneous com-

bustion there would be either a fast fire or explosion (36). The dividing line between explosion and fire is almost imperceptible (36). If the dust on walls, timbers and cobwebs was accidentally disturbed so that it fell and passed near a flame it would ignite and in turn ignite other dust or inflammable substances in close proximity (44).

The fire occurred on Sunday morning at 9:00 o'clock. Humus lignite had been ground up to 4 p. m. of the day before and the bentonite processing machinery was in motion up to and including the moment of the outbreak of the fire (16, 23). This included high temperature furnaces and hundreds, maybe a thousand open gas flames (23, 68).

On the morning of the fire the air was full of humus lignite dust (24). The machinery was running and kept it stirred up. During the hour which one workman worked before the fire, he had to use a respirator to protect his lungs and he had to change the filter (24). A man was collecting the dust lodged on the floor but was making no headway (24). Two workmen engaged in cleaning out a bin had to take turns, one going outside for fresh air while the other worked (23).

The fire started as a big puff which instantly filled the room with smoke and fire. It was like an explosion. It was not confined to any particular place but was all over. Just a bunch of smoke and fire all over. It seemed to take just a few seconds after the fire took off for it to get all over the building (24-25). A man working on a bin couldn't get out in time and was burned to death (25).

The trial court gave clear and comprehensive instructions on circumstantial evidence, strictly in accord with the South Dakota rule (128). There was no exception to the instructions.

Petitioner made the usual motions for a directed verdict on the identical ground now urged (50, 125) which the trial court denied.

After verdict petitioner moved the court for judgment notwithstanding the verdict or in the alternative for a new trial, on the same grounds, which was denied (153).

On appeal petitioner again brought forward its claim that under the South Dakota rule as to proof of facts by circumstantial evidence, the evidence was insufficient to support the verdict. In their brief and oral argument before the Court of Appeals respondents conceded that the rule as to proof of a fact by circumstantial evidence in a civil action is as stated in *Erickson v. Todd,* 62 S. D. 280, 252 N. W. 879, and *Meier & Lockwood Corp. v. Dakota Live Stock Co.,* 46 S. D. 397, 193 N. W. 138, and that the Court must apply such rule in South Dakota cases. Respondents at all times maintained that, measured by the strict South Dakota rule, the evidence was ample to establish the facts to which the circumstantial proof applied.

ARGUMENT

Point 1.

The local law is as set forth in the South Dakota cases cited by petitioner and all such cases were cited in the briefs filed in the Court of Appeals and considered by that Court. The Court of Appeals for the Eighth Circuit has followed and applied the South Dakota rule in several cases, notably *Hardware Mut. Inv. Co. v. Jacob Hieb, Inc.,* 146 F. (2d) 447; *Jackson County v. Duffy,* 147 F. (2d) 227; *Minnehaha County v. Kelley,* 150 F. (2d) 356, and *Turner County v. Miller,* 170 F. (2d) 820. In all these cases the Eighth Circuit Court gave full recognition to the local circumstantial evidence rule in strict conformity

to the "Erie Doctrine" as stated by this Court in *Erie R. R. Co. v. Tompkins,* 304 U. S. 64, 58 S. Ct. 817.

The same is true of the case at bar. There is nothing in the opinion (176) indicating a departure from the rule. Judge Johnson, speaking for the Court, cites all of the South Dakota cases on the subject. Such cases establish the local law and the federal courts must apply it as revealed by the state decisions. The quotation in the opinion from *Meier & Lockwood Corp. v. Dakota Live Stock Inv. Co.,* 46 S. D. 397, 193 N. W. 138, indicates conclusively that the Court of Appeals sought to ascertain the meaning and scope of this local rule so as to use it as a yardstick in measuring the sufficiency of the evidence in this case. The opinion says:

> "And the South Dakota Supreme Court itself has said, quoting from Finkelston v. Chicago, Milwaukee & St. P. Ry. Co., 94 Wis. 270, 68 N. W. 1005, in relation to proof of the origin of a fire: 'Obviously it is no objection that the origin of the fire was not established by direct evidence. If such an occurrence is within reason, then it was for the jury to say whether the fire was so caused or not."

That the language used is that of the Supreme Court of Wisconsin does not militate against its effectiveness as a statement of the South Dakota rule. In *King v. Yancy,* 147 F. (2d) 379, it is said:

> "Circuit Court of Appeals, in determining Nevada law on a particular point, would accept as authoritative a California decision on such point which Supreme Court of Nevada had cited and followed."

It is clear, therefor, that the Court of Appeals has not decided any question involved in this case in conflict with applicable local decisions.

Point 2.

Petitioner says that the Court of Appeals failed to follow local law in that the decision is to the effect that respondents could recover if an inference in favor of respondents' theory was "within reason" as distinguished from established "with reasonable certainty."

The phrases "within reason" and "with reasonable certainty" are practically synonymous. Be that as it may, it must be kept in mind that the South Dakota Supreme Court, not the Court of Appeals, chose the phrase "within reason" as expressive of its conception of the rule whereby the sufficiency of circumstantial evidence should be determined.

The federal courts must determine for themselves the scope and nature of the state decisions that they are obliged to follow under the conformity statute and Rule of Civil Procedure 81. *Risty v. Rock Island, et al.,* 270 U. S. 378, 46 S. Ct. 236. This the Court of Appeals did. It determined the scope and meaning of the South Dakota rule relating to the quantum of proof where circumstantial evidence was used to prove a fact, and applying the rule, as laid down by the local court, it found the evidence ample as proof of the fact in question.

Point 3.

There being no question about the applicable South Dakota rule, we contend that this court should not be called upon merely to recanvas the evidence. As said by Judge Taft in *Lane & Bowler Corporation v. Western Well Works,* 261 U. S. 387, 67 L. Ed. 712, review by certiorari is for cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties.

It is well settled that certiorari will not be granted to review questions of fact. *Magnum Import Co. v. Coty*, 262 U. S. 159, 67 L. Ed. 922; *Southern Power Co. v. North Carolina Public Service Co.*, 263 U. S. 508, 68 L. Ed. 413.

The record, however, leaves no room for doubt that the proof established with "reasonable certainty" that the fire was caused by the contact of the clouds of inflammable coal dust with one or more of the numerous sources of ignition maintained by petitioner for processing bentonite.

At the time of the fire the bentonite processing machinery was in operation (16, 23). This included high temperature furnaces and hundreds, maybe a thousand, open gas flames (23, 68). The air was full of humus lignite dust (24). The fire started as a big puff which instantly filled the room with smoke and fire. It was like an explosion. It was only a few seconds after the fire took off for it to get all over the large building (24-25).

These circumstances are entirely inconsistent with any other reasonable theory as to the cause and origin of the fire. It was a fast flash fire almost like an explosion. If caused by any other agency than the open flames igniting the inflammable coal dust, the fire would be comparatively slow, at least at the point of origin, and it would have taken considerable time for it to spread to all parts of the large building. The flash fire coming on like a puff or explosion is inconsistent with any theory as to the origin of the fire except that the open flames ignited the coal dust present, not only in and upon the frame structure, but which permeated the air to such an extent that rapid or flash propogation of the flame was possible. Wood in the shape of boards and timbers will not flash or explode upon being ignited. This coal dust upon ignition, under undisputed proof, would produce a flash fire or explosion.

No other rational theory as to the origin of the fire has any basis in the evidence. The Court of Appeals so determined upon a careful evaluation of the evidence.

Point 4.

Certiorari should not be granted here because (a) the petition fails to show that the Court of Appeals made any decision or ruling in conflict with South Dakota law; on the contrary the record shows full recognition and compliance with local law, and (b) the matter of the sufficiency of the evidence measured by the local yardstick, is for trial and appellate courts and their rulings on the quantum, weight and probative value of evidence should not be made the subject or review by certiorari in this court.

a.

We have heretofore pointed out that instead of disregarding local law the Court of Appeals definitely recognized the South Dakota rule and used it in determining the sufficiency of the evidence to support the jury verdict.

b.

The only question, then, is the sufficiency of the evidence in this particular case, a question twice squarely before the trial court and again determined by the Court of Appeals. This should be enough. This court should not be asked to reappraise proof already canvassed by trial and appellate courts except, perhaps, in a few cases where it is patent that the right to a jury trial has been wrongfully denied. *Wilkerson v. McCarthy,* 69 S. Ct. 413. It has been established that the jurisdiction of this court to review judgments of the Court of Appeals by certiorari is a jurisdiction to be exercised sparingly (*Forsyth v. Hammond,* 166 U. S. 506, 41 L. Ed. 1025), and

only in extraordinary cases of peculiar gravity and importance. 36 *C. J. S.* 109. This court should not become a trier of fact except as stated by Justice Douglas in *Wilkerson v. McCarthy,* supra:

> "The criterion governing the exercise of our discretion in granting or denying certiorari is not who loses below but whether the jury function in passing on disputed questions of fact and in drawing inferences from proven facts has been respected."

Here, two courts passed on the evidence and found it sufficient under the applicable rule. The jury function was respected. These determinations should be final.

Respondents ask that the petition for certiorari be denied.

Respectfully submitted,

H. F. FELLOWS,
Rapid City, South Dakota,

PAT MORRISON,
JULIUS SKAUG,
Mobridge, South Dakota,

LEM OVERPECK,
Belle Fourche, South Dakota,
Attorneys for Respondents.